STATE OF MICHIGAN

SUPREME COURT

RANDALL G. PAIGE
Plaintiff-Appellee,

v

CITY OF STERLING HEIGHTS
Defendant-Appellant.
_____/

Supreme Court no. 127912

Court of Appeals no. 256451

Lower Court no. 03-000085

127912 (24)

3/29
27297

NOTICE OF HEARING

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

BRIEF AMICUS CURIAE IN SUPPORT OF APPLICATION FOR LEAVE TO APPEAL

PROOF OF SERVICE

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Now comes, Michigan Self-Insurers' Association, by and through counsel, Martin L. Critchell of the law firm of Conklin, Benham, Ducey, Listman & Chuhran, P.C., and pray that the Court grant leave to file a brief amicus curiae because

1. The Michigan Self-Insurers' Association (MSIA) is a non-profit association organized under the laws of Michigan which is comprised of more than two hundred employers and defined groups of employers that are authorized by the Bureau of Workers' & Unemployment Compensation to self-insure the responsibility for workers' disability compensation to employees by the terms of the WDCA, MCL 418.611(1)(a).

(A) The constituents of the MSIA conduct business in every sector of the economy of Michigan ranging from manufacturing, sales and service, regulated utilities to governmental operations.

(B) The constituents of the MSIA are employers that individually employ a few to thousands of people.

(C) The constituents of the MSIA are employers that collectively employ hundreds of thousands of people.

2. The constituents of the MSIA have hundreds of cases in which an employee died while receiving weekly workers' disability compensation and the costs of medical care for a disability from a personal injury arising out of and in the course of employment.

3. The brief amicus curiae of the MSIA provides a depth of perspective for the Court as it deliberates the law that applies to resolve the issues in this case.

4. Counsel for plaintiff-appellee, Teresa L. Martin, was contacted by telephone on (Friday) March 4, 2005, and expressed opposition to the participation of the MSIA as amicus curiae.

5. Counsel for defendant-appellant City of Sterling Heights, Phillip D. Churchill, Jr., was contacted by telephone on (Friday) March 4, 2005, and expressed no opposition to the participation of the MSIA as amicus curiae.

6. Counsel and the MSIA shall take any action directed by the Court deemed necessary for the administration of justice.

Respectfully submitted,

CONKLIN, BENHAM, DUCEY, LISTMAN & CHUHRAN, P.C.

BY: Martin Critchell

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CASES

STATEMENT OF THE BASIS FOR THE JURISDICTION OF THE COURT

Amicus curiae Michigan Self-Insurers' Association recognizes that the statement of the basis for the jurisdiction of the court by defendant-appellant City of Sterling Heights in the *Application for leave to appeal* is accurate and complete.

STATEMENT OF QUESTION PRESENTED

I

WHETHER THE RULING IN *HAGERMAN v GENCORP AUTOMOTIVE*, 457 MICH 720; 579 NW2D 347 (1998) ABOUT THE MEANING OF *THE PROXIMATE CAUSE* IN THE WORKERS' DISABILITY COMPENSATION ACT OF 1969 WAS VALID AFTER THE RULING IN *ROBINSON v CITY OF DETROIT*, 462 MICH 439; 613 NW2D 307 (2000) ABOUT THE MEANING OF *THE PROXIMATE CAUSE* IN THE GOVERNMENTAL IMMUNITY ACT.

Plaintiff-appellee Paige answers "Yes."

Defendant-appellant City of Sterling Heights answers "No."

Amicus curiae Michigan Self-Insurers' Ass'n answers "No."

Court of Appeals denied leave to appeal.

Workers' Compensation Appellate Commission answered "Yes."

Board of Magistrates answered "Yes."

STATEMENT OF FACTS

Randall G. Paige (Employee) died while receiving workers' disability compensation for a personal injury arising out of and in the course of employment by defendant-appellant City of Sterling Heights (Employer) ten years earlier. *Paige v City of Sterling Heights*, unpublished opinion of the Board of Magistrates, decided on February 25, 2003 (Docket no. 022503115), slip op., 4. (Appendix CC)

Plaintiff-appellee Adam Paige (Survivor) filed an application for mediation or hearing with the Bureau of Workers' and Unemployment Compensation (Bureau) for survivors weekly compensation and the costs of burial claiming that the personal injury at work was *the proximate cause* of the death of the Employee. *Application for mediation or hearing*, 1. The Employer appeared and denied responsibility in a carrier's response. *Carrier's response.* The Bureau then remitted the case to the Board of Magistrates (Board) for hearing and disposition.

The Board awarded the Survivor survivors weekly compensation and $6,000.00 for the costs of burial with the decision that the personal injury at work was *the proximate cause* of the death of the Employee as that term was described in the case of *Hagerman v Gencorp Automotive*, 457 Mich 720; 579 NW2d 347 (1998). *Paige v City of Sterling Heights*, unpublished order and opinion of the Board of Magistrates, decided on February 25, 2003 (Docket no. 022503115), slip op., 4-5. (Appendix CC)

The Workers' Compensation Appellate Commission (Commission) affirmed. *Page v City of Sterling Heights*, 2004 Mich ACO #136. (Appendix BB)

The Court of Appeals denied leave to appeal for lack of merit. *Paige v City of Sterling Heights*, unpublished order of the Court of Appeals, decided on January 10, 2005 (Docket no. 256451). (Appendix AA)

ARGUMENT

I

THE RULING IN THE CASE OF *HAGERMAN v GENCORP AUTOMOTIVE*, 457 MICH 720; 579 NW2D 347 (1998) ABOUT THE MEANING OF *THE PROXIMATE CAUSE* IN THE WORKERS' DISABILITY COMPENSATION ACT OF 1969 WAS NOT VALID AFTER THE RULING IN *ROBINSON v CITY OF DETROIT*, 462 MICH 439; 613 NW2D 307 (2000) ABOUT THE MEANING OF *THE PROXIMATE CAUSE* IN THE GOVERNMENTAL IMMUNITY ACT.

A statute in the Workers' Disability Compensation Act of 1969 (WDCA), MCL 418.101, et seq., ends the responsibility of an employer for weekly compensation with the death of an employee who has been disabled by a personal injury arising out of and in the course of employment by stating that *the death of the injured employee before the expiration of the period within which he or she would receive weekly payments shall be considered to end the disability and all liability for the remainder of such payments which he or she would have received in case he or she had lived shall be terminated.* MCL 418.375(1), main clause.

There is one exception. The exception is described by a non-restrictive relative clause in section 375(1) that states *but the employer shall thereupon be liable for the following death benefits in lieu of any further disability indemnity.* Section 375(1), non-restrictive relative clause. *But the employer shall thereupon be liable for the following death benefits in lieu of any further disability indemnity* is a non-restrictive relative clause because it adds another idea to the sentence. The thought expressed by this or any non-restrictive relative clause could have been expressed with another, *subsequent sentence.*

But the employer shall thereupon be liable for the following death benefits in lieu of any further disability indemnity is grammatical having been offset from the main clause with the punctuation mark of a comma. See, *Kales v City of Oak Park*, 315 Mich 266; 23 NW2d 658 (1946). *Winokur v Michigan State Bd of Dentistry*, 366 Mich 261; 114 NW2d 233 (1962).

The non-restrictive relative clause *but the employer shall thereupon be liable for the following death benefits in lieu of any further disability indemnity* is entirely clear. *The following death benefits* means the survivors compensation in MCL 418.375(2), first sentence, as that statute immediately *follows* section 375(1).

Section 375(2), first sentence, main clause, describes the *death benefits* by stating that,

> ". . . the death benefit shall be a sum sufficient, when added to the indemnity which at the time of death has been paid or becomes payable under the provisions of this act to the deceased employee, to make the total compensation for the injury and death exclusive of medical, surgical, hospital services, medicines, and rehabilitation services, and expenses furnished as provided in sections 315 and 319, equal to the full amount which such dependents would have been entitled to receive under the provisions of section 321, in case the injury had resulted in immediate death."

Section 375(2), second sentence, describes how the *death benefits* must be paid by the employer by stating that *such benefits shall be payable in the same manner as they would be payable under the provisions of section 321 had the injury resulted in immediate death.*

There are two conditions for a person to qualify for the *death benefits* described by section 375(2), first sentence, main clause. The conditions are signaled by the conditional *if* in ***if*** *the injury received by such employee was the proximate cause of his or her death, and the deceased employee leaves dependents as hereinbefore specified, wholly or partially dependent on him or her for support.* Certainly, *if* is used as a conjunction to introduce a conditional clause for the main clause to operate. This is the first and most common meaning of *if*. *The Oxford American College Dictionary*, 667 (Oxford University Press, 2002).

Two discrete conditions are signaled by the associative conjunction *and* in *if the injury received by such employee was the proximate cause of his or her death,* ***and*** *the*

deceased employee leaves dependents, as hereinbefore specified, wholly or partially dependent on him or her for support.

And is an associative conjunction to join two or more nouns, adjectives, or adverbs in a declarative sentence. *The American College Dictionary* (Random House 2004). *The New Fowler's Modern English Usage (Rev Ed)* (Clarendon Press, Oxford 1998).

The Court has recognized that *and* is indeed used in statutes as a connective conjunction. *Sun Valley Foods Co v Ward,* 460 Mich 230; 596 NW2d 119 (1999). *Thomason v Contour Fabricators, Inc,* 469 Mich 953; 671 NW2d 41 (2003). The Court said in the case of *Sun Valley Foods Co, supra,* 237, n 6,

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"[6] Our conclusion is bolstered by several expert opinions offered to support defendant.

Professor Donald Hettinga, an English professor at Calvin College and contributor to the Harbrace College Grammar Handbook, stated:

> The conjunction *and* joins two separate clauses that set forth distinct conditions. The parallelism of that construction makes one expect that if there were a time constraint the phrase defining it would appear immediately after *is filed,* in other words, in an analogous position to the phrase *before the expiration of the (10-day) period.* However, as it stands that particular phrase has no grammatical authority over the stuff of the second clause--the matter of the bond.

Professor Joan Karner Bush, an English professor from the University of Michigan stated:

> [T]he adverbial phrase 'before the expiration of the (10-day) period' modifies the verb is taken. . . . You asked what the adverbial propositional clause 'before the expiration' modified: 'is taken' or 'is filed.' I believe the adverbial phrase modifies the verb 'is taken.' My decision is based on the assumption that in clear writing modifiers are placed as close to the word they modify as possible and the 'before the expiration' is closest to 'is taken.'"

In the case of *Thomason, supra*, the Court recognized that *and* in MCL 418.301(1), first sentence, stating that, "[a]n employee who receives a personal injury arising out of *and* in the course of employment by an employer who is subject to this act at the time of the injury, shall be paid compensation as provided in this act" was an associative conjunction with the ruling that *arising out of* and *in the course of employment* were two different adjectives of *injury* that were both required to fulfill section 301(1), first sentence. See also, *Ruthruff v Tower Holding Corp (On recon)*, 261 Mich App 613, 617; 684 NW2d 888 (2004).

There has been some confusion about the meaning of *and* expressed by courts. *Heckathorn v Heckathorn*, 284 Mich 677; 280 NW 79 (1938). *Esperance v Chesterfield Twp*, 89 Mich App 456; 280 NW2d 559 (1979). The court said in *Esperance, supra*, 460-461, that,

> "[w]hile it is true that the use of the word 'and' in a statute usually connotes the conjunctive, this rule is not an absolute.
>
> > 'The popular use of 'or' and 'and' is so loose and so frequently inaccurate that it has infected statutory enactments. While they are not treated as interchangeable, and should be followed when their accurate reading does not render the sense dubious, their strict meaning is more readily departed from than that of other words, and one read in place of the other in deference to the meaning of the context.' *Heckathorn v Heckathorn*, 284 Mich 677, 681; 280 NW 79 (1938)."

Part of the difficulty in parsing out the meaning of *and* expressed in *Esperance, supra*, occurs because of the relationship between conjunction and negation which is reflected by the principle of logic commonly known as DeMorgan's Rules that can be expressed as

not (x and y) equals not (x) or not (y).

while

not (x or y) equals not (x) and not (y).

The distribution of the negative through a phrase in a sentence commonly occurs in statutes which involve the prohibition of conduct such as *Thou shall not rape and murder*. A reader would intuitively apply DeMorgan's Rules to distribute the prohibition conveyed by the word *not* to mean *Thou shall not rape* ***or*** *murder*. Only a confused reader would believe that the prohibition applied only to the rapist who also kills.

The other part of the difficulty with the meaning of the word *and* expressed in *Esperance, supra*, is in the relationship between conjunction and description in which a noun is modified by two adjectives (or adverbs) and expressed as

noun (x) has the properties of adjective (a) and adjective (b)

while

noun (x) has the properties of adjective (a) or adjective (b)

When adjective (a) and adjective (b) convey the same or a closely related idea, *and* can be read as *or*. This phenomena was explained by several grammarians in *Sun Valley Foods Co, supra*. An example of this phenomena is the statute in the WDCA which concerns misconduct by an employee, "[i]f the employee is injured by reason of his *intentional and wilful* misconduct, he shall not receive compensation under the provisions of this act." MCL 418.305 (emphasis supplied). The word *intentional* and the word *wilful* are adverbs which describe the verb *misconduct* that convey the same idea so that the word *and* in section 305 may be read as *or* without changing the meaning of the sentence.

When the adjective (a) and adjective (b) convey different ideas, *and* cannot be read as the alternative conjunction *or*. An example of this phenomena is present in the WDCA which states that, "'[r]easonable employment' as used in this section, means work that is *within the employee's capacity to perform* that poses no clear and proximate threat to that employee's health and safety, *and* that is *within a reasonable distance from that employee's residence*." MCL 418.301(9), first sentence (emphasis supplied). The adjectival

phrase *within the employee's capacity to perform* conveys an entirely different idea from the other adjectival phrase *within a reasonable distance from that employee's residence* so that the word *and* is a connective conjunction. *And* cannot be read as *or* without confusing the meaning conveyed by section 301(9), first sentence.

And in section 375(2), first sentence, conditional clause, is an associative conjunction. Section 375(2), first sentence, is a declarative sentence. There is no negative to be distributed. And the first predicate, *the injury received by such employee,* expresses an idea utterly different from the second predicate, *dependents, as hereinbefore specified.*

The problem in this case concerns the meaning of the first condition in the conditional clause of section 375(2), first sentence, which is *the proximate clause.*

In the case of *Hagerman v Gencorp Automotive,* 457 Mich 720; 579 NW2d 347 (1998), reh den 459 Mich 1203; 615 NW2d 713 (1998), the Court actually ruled on what *the proximate cause* did and did not mean. The Court held that *the proximate cause* meant *a substantial factor* by stating in the case of *Hagerman, supra,* 736, that,

> "[w]e hold, as a matter of public policy, considering our historical treatment of proximate cause in tort and worker's compensation cases, that death is within the range of compensable consequences if the injury was a substantial factor in the death, and, we acknowledge, in the absence of a universally applicable test for proximate cause, that such decisions will almost always turn on the facts and circumstances presented in a given case."

And the Court held that *the proximate cause* did mean the only cause by stating in *Hagerman, supra,* 728-729,

> ". . . we find no basis to conclude that legally recognized cause under subsection 375(2) means sole proximate cause.
>
> We need not revisit our decision in *Dedes, supra,* that '[t]he word 'the' before 'proximate cause' is not to be read to limit recovery if the plaintiff or another is also a cause . . . [or] to prevent a defendant from claiming comparative negligence . . . .' *Id.* at 118. Rather, for purposes of the question presented here, we need only observe that our reading

of subsection 375(2) is consistent with the dictionary definitions of 'a' and 'the.'

> A. . . . The word 'a' has varying meanings and uses. 'A' means 'one' or 'any,' but less emphatically than either. . . . [Black's Law Dictionary (5th ed), p 1.]
>
> The. An article which particularizes the subject spoken of. 'Grammatical niceties should not be resorted to without necessity; but it would be extending liberality to an unwarrantable length to confound the article 'a' and 'the.' The most unlettered persons understand that 'a' is indefinite, but 'the' refers to a certain object. [*Id.* at 1324.]

'Proximate cause' generally refers to the 'primary or moving cause.' *Id.* at 1103. Therefore, while 'a' force might be one of a series of causes, 'the' primary or moving force, does not logically or linguistically negate the existence of other forces. Stated otherwise, use of the term 'the' to modify the object 'proximate cause' does not compel the conclusion that the phrase means *sole* cause. Recognition of the fact that 'proximate cause' means, in broad terms, 'primary cause,' requires us to also acknowledge the existence of other legally recognizable causes. Thus, we refuse defendant's invitation to engraft the word 'sole' onto the statute between 'the' and 'proximate cause' and instead look to the common law to understand the meaning of the phrase 'the proximate cause' in the WDCA."

There would be no significant question about the meaning of *the proximate cause* in section 375(2), second sentence, conditional clause, were the ruling in the case of *Hagerman, supra,* the last ruling by the Court on the meaning of *the proximate cause*. However, *Hagerman, supra,* is *not* the last ruling by the Court about the meaning of *the proximate cause*. After deciding the case of *Hagerman, supra,* the Court returned to the question about the meaning of *the proximate cause* in the case of *Robinson v City of Detroit,* 462 Mich 439; 613 NW2d 307 (2000).

In the case of *Robinson, supra,* 445-446, the Court overruled *Dedes v Asch,* 446 Mich 99; 521 NW2d 488 (1994) and held that *the proximate cause* in the Governmental Immunity Act (Immunity Act), MCL 691.1407(2) means *the one most immediate, efficient, and direct cause* by stating that,

". . . we overrule *Dedes v Asch*, 446 Mich 99; 521 NW2d 488 (1994), and hold that the phrase 'the proximate cause' as used in the employee provision of the governmental immunity act, MCL 691.1407(2); MSA 3.996(107)(2), means the one most immediate, efficient, and direct cause preceding an injury, not 'a proximate cause.'"

The meaning of *the proximate cause* that the Court expressed in the case of *Robinson, supra,* was quite different from that which was given in the case of *Hagerman, supra*. This can be seen by the recognition and reliance upon the dissenting opinion in the case of *Hagerman, supra,* for the standard expressed in the case of *Robinson, supra*. The Court said in the case of *Robinson, supra,* 461-462, that,

> "[w]e agree with the following analysis found in the dissent in *Hagerman v Gencorp Automotive*, 457 Mich 720, 753-754; 579 NW2d 347 (1998):
>
> > Traditionally in our law, to say nothing of our classrooms, we have recognized the difference between 'the' and 'a.' 'The' is defined as 'definite article. 1. (used, esp. before a noun, with a specifying or particularizing effect, as opposed to the indefinite or generalizing force of the indefinite article a or an) . . .' *Random House Webster's College Dictionary*, p 1382. Further, we must follow these distinctions between 'a' and 'the' as the Legislature has directed that '[a]ll words and phrases shall be construed and understood according to the common and approved usage of the language . . . . MCL 8.3a; MSA 2.212(1). Moreover, there is no indication that the words 'the' and 'a' in common usage meant something different at the time this statute was enacted. . . ."

Ultimately, the question in this particular case is whether *Hagerman, supra,* or *Robinson, supra,* provides the binding meaning of *the proximate cause* in section 375(2), first sentence, conditional clause. Reduced to the very simplest of terms: did *Robinson, supra,* reverse *Hagerman, supra*?

This question *is a question of law* which the Court may review by the authority of MCL 418.861a(14), second sentence, which states that, "the . . . supreme court shall have the power to review questions of law involved with any final order of the commission, if application is made by the aggrieved party within 30 days after the order by any method

permissible under the Michigan court rules." A question about which case law provides the meaning for a word or term in a statutes *is* a *question of law*. *Mudel v Great Atlantic & Pacific Tea Co*, 462 Mich 691; 614 NW2d 607 (2000). *Rakestraw v Gen Dynamics Land Sys, Inc*, 469 Mich 220; 666 NW2d 199 (2003). In the case of *Mudel, supra*, the Court considered the conflict in the decisions about the meaning of the scope of review available to the Commission. This conflict was resolved with the affirmation of *Holden v Ford Motor Co*, 439 Mich 257; 484 NW2d 227 (1992) and the reversal of *Goff v Bil-Mar Foods, Inc (After Remand)*, 454 Mich 507; 563 NW2d 214 (1997) and *Layman v Newkirk Electric Assoc, Inc*, 458 Mich 494; 581 NW2d 244 (1998). *Mudel, supra*, 696-697. The Court considered another collision in the case law about the meaning of a statute as a *question of law*. *Rakestraw, supra*, 228-229.

This process is conducted by the Court de novo. *Lincoln v Gen Motors Corp*, 461 Mich 483; 607 NW2d 73 (2000), reh den 461 Mich 1290 (2000). *Stozicki v Allied Paper Co*, 464 Mich 257; 627 NW2d 293 (2001).

Underscoring that the question is indeed a *question of law* is the absence of a question of fact. The facts about who, what, when, where, how, and why were not and are not now in dispute.

The person who is involved is the Employee. Although not a party, the claim for compensation is based only on the experience of the Employee. Certainly, the Survivor has no different status than the Employee in the claim for compensation from the Employer.

What happened to the Employee is plain. The Employee died.

When the Employee died is equally plain. The Employee died while receiving compensation for a personal injury arising out of and in the course of employment by the Employer some ten years earlier. The Employee was injured at work for the Employer on October 12, 19911, and died on January 4, 2001.

How the Employee died was a heart attack.

And why the Employee had the fatal heart attack was the failure of bypass surgery. These facts were established by the Commission in *Paige v City of Sterling Heights*, 2004 Mich ACO #136, slip op., 1-5.

There is nothing special about the facts of this case. Indeed, the facts of this case are present in every case in which an employee dies while receiving or eligible for compensation because of an earlier injury arising out of and in the course of employment. *Every* employee receiving compensation from an employer will die. Certainly, the Commission did not see any of the particular facts of this case as special to the rule of law. That is, it was not important that the Employee was injured or died on the particular dates or that the injury was a heart attack.

The fact which was important to the Commission for deciding what case law to apply was that this case was a claim for compensation brought by the terms of section 375(2), first sentence, by stating in *Paige, supra*, slip op., 4,

> "[the Survivor] counters this argument by distinguishing *Robinson* from *Hagerman* on the basis that *Robinson* involved (as [the Employer] concedes) interpretation of the governmental immunity statute. *Hagerman*, on the other hand, specifically addressed and interpreted the exact proximate cause standard presented in Sec. 375(2), which is directly applicable to the case herein. [The Survivor] brief accurately illustrates the proposition that the concept and scope of 'proximate cause' is a matter of public policy and that when applied to tort actions, results in an application that 'reaches further' than it does in workers' compensation death cases. Pointing out that the practical effect of [the] proposed interpretation of Sec. 375(2) would require a showing of 'sole' proximate causation for a [survivor] in a death action to prevail, [the Survivor] contends that the [Board] was correct in [the] application of *Hagerman*: We agree, finding the application of *Hagerman* to the facts of this cause was correct . . ."

Of course, there is no dispute that this case was a claim for compensation by a survivor brought by the terms of section 375(2), first sentence, and not a claim of immunity by the terms of the Immunity Act.

Again, the dispute is with the rule of law: was *Hagerman, supra,* valid after *Robinson, supra.*

The question about the continuing validity of the ruling by the Court about *the proximate cause* in the case of *Hagerman, supra,* is significant in three ways. First, the question occurs in each and every case in which an employee dies while receiving compensation for a prior personal injury arising out of and in the course of employment. That is each and every case in which an employee receives compensation!

Second, the result by the Commission is to limit the ruling by the Court in the case of *Robinson, supra,* to only those cases arising under the Immunity Act. The Court and only the Court should describe the scope of the application of a ruling about the meaning of a word or term in a statute when that very same word or term appears in another statute. Otherwise, the lower courts may improperly partition the rulings by the Court with the same consequences in the Balkans. Indeed, the result of the Commission is to Balkanize the meaning of *the proximate cause.* As it now stands, *the proximate cause* means one thing in a compensation case, *Hagerman, supra,* and something else in an Immunity Act case, *Robinson, supra.*

And third, the question involves how to understand and apply two rulings by the Court. The Commission decided that only the most explicit method could be used by concluding that *Hagerman, supra,* remained valid because it had not been overruled by the Court in the case of *Robinson, supra.* This is not a proper point of distinction. In the case of *Carnes v Livingston Co Bd of Ed,* 341 Mich 600; 67 NW2d 795 (1954), the Court held that an abstract method was proper. In particular, a ruling in one field of law *could* apply in another when the principle was the same. *Carnes, supra,* 604. There, the Court said,

> "[t]here is no necessity for considering plaintiffs' contention that the trial court erroneously decided the case on the basis of Michigan's general election laws rather than its school laws because of the citation and reliance in its opinion on cases construing election laws. When cases are analogous they have

precedential value regardless of the diverse fields of law involved."

The Commission was plainly wrong. The ruling by the Court in the case of *Robinson, supra,* did invalidate the ruling in the case of *Hagerman, supra,* about the meaning of *the proximate cause*. First, the Court recognized and relied on the dissent in the case of *Hagerman, supra,* which is a powerful indication of the reproval of the decision in *Hagerman, supra,*

> "[w]e agree with the following analysis found in the dissent in *Hagerman v Gencorp Automotive*, 457 Mich 720, 753-754; 579 NW2d 347 (1998):
>
> > Traditionally in our law, to say nothing of our classrooms, we have recognized the difference between 'the' and 'a.' 'The' is defined as 'definite article. 1. (used, esp. before a noun, with a specifying or particularizing effect, as opposed to the indefinite or generalizing force of the indefinite article a or an) . . .' *Random House Webster's College Dictionary*, p 1382. Further, we must follow these distinctions between 'a' and 'the' as the Legislature has directed that '[a]ll words and phrases shall be construed and understood according to the common and approved usage of the language . . . . MCL 8.3a; MSA 2.212(1). Moreover, there is no indication that the words 'the' and 'a' in common usage meant something different at the time this statute was enacted. . . ." *Robinson, supra,* 461-462.

Second, and relatedly, the Court cited all of the statutes which used the term *the proximate cause* as did the Immunity Act including section 375(2), first sentence, when deciding the case of *Robinson, supra,*

> ". . . the Legislature has shown an awareness that it actually knows that the two phrases are different. It has done this by utilizing the phrase 'a proximate cause' in at least five statutes[16] and has used the phrase 'the proximate cause' in at least thirteen other statutes.[17]
>
> * * *

---

[17] See MCL 257.633(2); MSA 9.2333(2), MCL 324.5527; MSA 13A.5527, MCL 324.5531(11); MSA 13A.5531(11), MCL 324.5534; MSA 13A.5534, MCL 418.375(2); MSA 17.237(375)(2), MCL 500.214(6); MSA 24.1214(6), MCL

600.2912b(4)(e); MSA 27A.2912(2)(4)(e), MCL 600.2912b(7)(d); MSA 27A.2912(2)(7)(d), MCL 600.2912d(1)(d); MSA 27A.2912(4)(1)(d), MCL 600.2947(3); MSA 27A.2947(3), MCL 600.5839(1); MSA 27A.5839(1), MCL 691.1407(2)(c); MSA 3.996(107)(2)(c), and MCL 750.90e; MSA 28.285e."

Robinson, supra, 460, 460, n 17.

This is a powerful indication that the Court anticipated that the meaning of *the proximate cause* for the Immunity Act would have the very same meaning for all of these thirteen statutes having the term *the proximate cause*, including section 375(2), first sentence.

Third, the distinction that the Court made in the case of *Robinson, supra*, was between *a proximate cause* and *the proximate cause*, not between the Immunity Act and the WDCA by stating in *Robinson, supra*, 460,

> ". . . the judiciary has always adhered to the principle that the Legislature, having acted, is held to know what it has done, i.e., to know the difference between 'a proximate cause' and 'the proximate cause.' Yet, in this circumstance, it is not necessary to rely on theoretical surmises to conclude this, as the Legislature has shown an awareness that it actually knows that the two phrases are different. It has done this by utilizing the phrase 'a proximate cause' in at least five statutes[16] and has used the phrase 'the proximate cause' in at least thirteen other statutes.[17] Given such a pattern, it is particularly indefensible that the *Dedes* majority felt free to read the 'proximate cause' as if it said 'a proximate cause.'"

Finally, the dissenting opinions in the case of *Robinson, supra*, actually support the application of the ruling by the majority here. Neither Justice Kelly nor Justice Cavanagh said that the decision about the meaning of *the proximate cause* in the Immunity Act was or should be confined to cases involving the Immunity Act. Instead, both dissenting opinions sharply advocated that no change in the law should occur for a host of reasons. *Robinson, supra*, 481-485 (KELLY, J., concurring in part, dissenting in part). *Robinson, supra*, 493-494 (CAVANAGH, J., dissenting).

Indeed, the rule that was announced by the Court in the case of *Hagerman, supra*, was actively promoted in the dissent by Justice Kelly, *Robinson, supra*, 484-485

(KELLY, J., dissenting) which is another indication that no Justice thought that the case of *Hagerman, supra*, could be distinguished because it involved the WDCA.

RELIEF

Wherefore, amicus curiae Michigan Self-Insurers' Association prays that the Court grant leave to appeal.

Respectfully submitted,

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